Supreme Court, U.S.
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In The

Supreme Court of the United States

THE LAKIN LAW FIRM, P.C.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The questions presented by this case are:

1. Are the names and/or addresses of persons who make complaints about businesses to federal agencies "similar files" as that term is used in 5 U.S.C. § 552(b)(6)?

2. If so, does the release of these names and/or addresses constitute a "clearly unwarranted invasion of personal privacy" such that no set of facts could ever be proven justifying the release of this information under the Freedom of Information Act 5 U.S.C. § 552 et seq.?

The Seventh Circuit's decision answered both questions in the affirmative. Because this is an important question of federal law that has not been, but should be settled by this Court, and because the Seventh Circuit's holdings conflict with the implied precedent of this Court, as well as other Circuits, Petitioner respectfully submits that *certiorari* should be granted. In fact, this Court *did* grant *certiorari* in a case from the Seventh Circuit substantially identical to this case, though this Court vacated the lower court opinion and remanded without a decision on the merits in light of a funding resolution from Congress after *certiorari* had been granted in that case. See, *Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms v. City of Chicago, Illinois*, 123 S. Ct. 536 (2002) (granting *certiorari* in a substantially identical case) and *Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives v. City of Chicago, Illinois*, 123 S. Ct. 1352 (2003) (vacating the lower opinion and remanding the case to determine what effect, if any, a subsequent funding resolution had on the case).

PARTIES TO THE PROCEEDINGS

Petitioner is The Lakin Law Firm, P.C., a privately held corporation. Respondent is the Federal Trade Commission, an agency of the United States.

SUPREME COURT RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Caption: *The Lakin Law Firm, P.C. v. The Federal Trade Commission*

There is no parent corporation to the Lakin Law Firm.

There is no publicly held company that owns 10% or more of the corporation's stock.

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OPINIONS BELOW

The unpublished order of the United States District Court for the Southern District of Illinois, dismissing this case pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a cause of action upon which relief can be granted, is reprinted here as Appendix B. The opinion of the United States Court of Appeals for the Seventh Circuit affirming the district court is reported at 353 F.3d 1122 (7th Cir. 2003) and is reprinted as Appendix A. The unreported order by the United States Court of Appeals for the Seventh Circuit denying a petition for rehearing and suggestion for rehearing *en banc* appears as Appendix C.

JURISDICTION

The United States District Court for the Southern District of Illinois had subject matter jurisdiction pursuant to 5 U.S.C. § 552 and 28 U.S.C. § 1331. The United States Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, as the district court dismissed the case with prejudice, resulting in a final appealable order. The Seventh Circuit Court of Appeals issued the opinion below on December 16, 2003. The Seventh Circuit Court of Appeals denied a timely request for rehearing and rehearing *en banc* on February 11, 2004. This Court has jurisdiction to review the judgment below by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq. FOIA generally provides,

"[a]ny request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3). "This section shall not apply to matters that are – . . . (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The pertinent provisions of the statute appear as Appendix D.

STATEMENT OF THE CASE

On May 22, 2002, the petitioner, The Lakin Law Firm, P.C. ("Lakin"), requested certain documents relating to "cramming" – the practice of charging a consumer a fee, without that consumer's knowledge or permission, and placing it on the consumer's bill in the hope that the consumer will not notice the charge, and/or unwittingly pay it – of charges on consumers' credit card bills from the Federal Trade Commission ("FTC"), pursuant to the FOIA. While Petitioner did not want the documents for this purpose, its release was consistent with the core purpose of the FOIA, as the information could have been reasonably used to shed light on the actions of the FTC, and to determine public satisfaction with the agencies action. The respondent, FTC, partially granted Lakin's FOIA request, but denied it in part by redacting the names and addresses of the consumers who filed the cramming complaints, claiming an exemption to the FOIA under Exemption 6, and rendering the information released totally useless for any purpose. Lakin timely filed an administrative appeal of the partial denial of the FOIA request in accordance

with FTC regulations, which was denied, and on November 1, 2002, Lakin timely filed a complaint in the United States District Court for the Southern District of Illinois. The district court had federal subject matter jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331, as Lakin had exhausted its administrative remedies under the FOIA, and the case presented a federal question.

The district court dismissed the case, with prejudice, pursuant to Federal Rule of Civil Procedure 12(b)(6), finding that as a matter of law, Lakin could prove no set of facts entitling Lakin to relief, the basis of which being that the names and / or addresses constituted "similar files," under FOIA Exemption 6, and their release to Lakin would constitute "a clearly unwarranted invasion of personal privacy," as a matter of law. Lakin timely filed an appeal, and on December 16, 2003, the Court of Appeals for the Seventh Circuit affirmed the district court on the same basis. Lakin timely filed a petition for rehearing and suggestion for rehearing *en banc*, which was denied on February 11, 2004. Lakin timely filed this Petition for a Writ of Certiorari.

ARGUMENT IN FAVOR OF GRANTING PETITION FOR CERTIORARI

I. The Scope of Exemption 6 of the Freedom of Information Act is an Important Question of Federal Law that Has Not Been, but Should be, Settled by This Court.

The FOIA is an important federal statute the purpose of which is to allow an informed citizenry to know what its government is doing. Under the Seventh Circuit analysis

of Exemption 6 of the FOIA, the name and address of anyone contained in any government document is exempt from disclosure, under all sets of facts. No court of record has ever held this before. If allowed to stand, it will be impossible for the citizens of the United States to determine with any degree of confidence, whom agencies of the United States are affecting, whether these agencies are in any way responsive to the needs of the persons who contact them, or whether documents alleged to have been created in response to contact with the public are even genuine, as there is no way to contact persons who would have unique knowledge that would shed light on the actions of the United States.

If the holding of the Seventh Circuit is allowed to stand, no name or address contained in any document under the control of a United States agency can possibly be released. Applying this test to documents commonly available, The Declaration of Independence and the Constitution of the United States would have to be redacted, if copies were requested under the FOIA, as the signatures at the end would be "similar files" and "would constitute a clearly unwarranted invasion of personal privacy," under the Seventh Circuit's holding. Also logically following, the names of Congressmen in all documents held by federal agencies will be withholdable, as will the names of persons who may have bribed federal officials, and the names of persons who influenced decisions of federal agencies. Clearly the purpose of FOIA is frustrated by this position of law, and this cannot be the intent of Congress.

While this Court has had numerous occasions to consider the FOIA, as well as Exemption 6, it has always done so in the posture of assuming a valid cause of action

had been stated, and with the benefit of a complete record. This Court has never considered Exemption 6 under a Federal Rule of Civil Procedure 12(b)(6) analysis as to whether or not names in a document, *per se*, are "similar files," or their release "would constitute a clearly unwarranted invasion of personal privacy." This Court should do so.

II. The Decision of the Seventh Circuit Resolves the Scope of Exemption 6 of the Freedom of Information Act in a Way that Conflicts with Relevant Decisions of This Court and Other Federal Circuits.

The United States Court of Appeals for the Seventh Circuit, in affirming the District Court's dismissal of Lakin's FOIA case, found that "Lakin has failed to carry its burden . . . " under Federal Rule of Civil Procedure 12(b)(6). In so doing, the Seventh Circuit disregarded binding precedent both of this Court, and other appellate circuits, as under Rule 12(b)(6), the burden is on the defendant and under the FOIA, an agency seeking to justify a withholding bears the burden. See *Albright v. Oliver*, 510 U.S. 266, 267, 114 S. Ct. 807, 810, 127 L.Ed.2d 114 (1994); *U.S. Department of State v. Ray*, 502 U.S. 164, 173, 112 S. Ct. 541, 547, 116 L.Ed.2d 526 (1991); *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1125 (10th Cir. 1994); *Ragin v. N.Y. Times*, 923 F.2d 995, 999 (2nd Cir. 1991).

If the Seventh Circuit properly followed established law as to Federal Rule of Civil Procedure 12(b)(6), it would follow, logically, that the court found that the requested files were "similar files," within the meaning of Exemption 6, and that their release "would constitute a clearly unwarranted invasion of personal privacy" such that no

set of facts could *ever* be proven that could in any way lead to the opposite conclusion. This holding is contrary to *United States Department of State v. Washington Post Co.*, 456 U.S. 595, 598, 102 S. Ct. 1957, 72 L.Ed.2d 358 (1982), which while it found that withholding names was appropriate in that case, did so only on the basis of the factual record before the Court, and did not assert any per se rule. In so doing, this Court implied that *Washington Post Co.* had stated a viable cause of action, as that was necessary to get to the issues of the record, and if *Washington Post Co.*, stated a viable cause of action, so did Petitioner in the case here.

To the extent that the Seventh Circuit's decision in this case conflicts with the above cited cases, it results in an irreconcilable split in authority among the federal circuits, and is contrary to the holdings of this Court. As a result, the identical complaint being filed in federal district courthouses less than 10 miles away from each other (the approximate distance between the East Saint Louis, Illinois federal courthouse in the Seventh Circuit and the Saint Louis, Missouri federal courthouse in the Eighth Circuit) stand to result is differing treatment with identical complaints. The Court should correct this error to bring harmony back within the circuits, and to bring the Seventh Circuit back within the ambit of this Court's precedents.

CONCLUSION

The petition for writ of *certiorari* should be granted in this case to settle the scope of Exemption 6 to the Freedom of Information Act, which is a significant national interest,

and to resolve a conflict between the circuits, and of this Court, as a result of the Seventh Circuit opinion.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 03-1689

THE LAKIN LAW FIRM, P.C.,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Illinois. No. 02-CV-1121-DRH – **David R. Herndon,** *Judge.*

ARGUED SEPTEMBER 22, 2003 – DECIDED DECEMBER 16, 2003

Before ROVNER, EVANS, and WILLIAMS, *Circuit Judges.*

EVANS, *Circuit Judge.* When people feel so strongly about something that they actually complain about it to a federal agency, they probably think their names and addresses will not be released to a firm of private lawyers seeking fuel to propel a possible class-action lawsuit. And so it is with this case which deals with "cramming" – the shady practice of putting bogus charges on a person's bill (usually a monthly credit card statement) in the hope that

the consumer will pay the inflated balance without noticing that he has been duped.

The Lakin Law Firm, a small band of lawyers operating out of Wood River, Illinois, filed a Freedom of Information Act (FOIA) request with the Federal Trade Commission (FTC) seeking "[a]ny consumer complaints" about charges "'crammed' . . . onto credit card bills, phone bills, or mortgage statements," particularly complaints of this nature against Cendant Corporation, FleetBoston Financial Corporation, Fleet Credit Card Services, Bell Atlantic, Bank of America, or Washington Mutual. The FTC granted the request in part, releasing some 1,400 pages of complaints. But it withheld the names and addresses of those who complained, claiming "[t]his information is exempt from release under FOIA Exemption 6, 5 U.S.C. § 552(b)(6), because individuals' right to privacy outweighs the general public's interest in seeing personal identifying information."

Lakin filed an administrative appeal of the Commission's partial denial, stating

> "[p]ersonal privacy" does not include a consumer complaint. Personal privacy has to do with something that could cause injury to a person, such as disclosing the names of Iranian students who have sought asylum in the United States, and who would be killed if their government found them. There is no such threat here. This information has one, and only one use; to bring the companies that the consumers are complaining about to justice.

The appeal was denied and the law firm filed this suit in the district court challenging the FTC's decision. The

district judge dismissed the suit and we now consider Lakin's appeal.

The FOIA has a noble goal: it contemplates a policy of broad disclosure of government documents to serve the "basic purpose of ensuring an informed citizenry, vital to the functioning of a democratic society." *Solar Sources, Inc. v. United States,* 142 F.3d 1033, 1037 (7th Cir. 1998), quoting *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978). Stated another way, the FOIA's central purpose is to guarantee "that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed." *U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press,* 489 U.S. 749 (1989) (emphasis in original).

The FOIA requires governmental agencies "upon any request for records which . . . reasonably describes such records . . . [to] make the records promptly available." 5 U.S.C. § 552(a)(3). But like many laws and most rules, the FOIA has loads of exemptions. Exemption 6, at issue in this case, permits the withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." We think the information withheld here by the FTC clearly falls within the exemption.

One item we found to be exempt from disclosure when complying with a FOIA request was *the name of a high school student* who asked the Department of Justice for information about the wiretapping of Jimmy Hoffa. *Silets v. U.S. Dep't of Justice,* 945 F.2d 227 (7th Cir. 1991) (*en banc*). Other courts have taken a similar view. *See Strout v. U.S. Parole Comm'n,* 40 F.3d 136, 139 (6th Cir. 1994)

(names and addresses of people who wrote to Parole Commission opposing a convict's parole); *Voinche v. Fed. Bureau of Investigation,* 940 F. Supp. 323, 329-30 (D.D.C. 1996) ("identities of . . . private citizens who wrote to government officials. . . . "), *aff'd per curiam,* 1997 WL 411685 (D.C. Cir.); *Holy Spirit Ass'n v. U.S. Dep't of State,* 526 F. Supp. 1022, 1032-34 (S.D.N.Y. 1981) (identities of individuals who wrote letters to senators about the Unification Church). Although disclosure in some of these cases was upheld under different exemptions (there are several) in the FOIA, they have one thing in common: personal identifying information is regularly exempt from disclosure. And that is as it should be, for the core purpose of the FOIA is to expose what the government is doing, not what its private citizens are up to.

Against this backdrop, the Lakin firm advances several unpersuasive arguments in support of its contention that the FTC has not fully complied with its request. First, citing a district court case in California, it argues that there is an inconsistency between the FTC's position here and its effort to obtain by means of a Civil Investigative Demand (CID) the names and addresses of consumers who complained to a company that was under investigation. There is, however, no inconsistency. The Commission's CID authority does not alter our Exemption 6 analysis because the standards governing enforcement of government agencies' CIDs are wholly different from FOIA principles. *See, e.g., FTC v. Texaco, Inc.,* 555 F.2d 862, 879 (D.C. Cir. 1977) (*en banc*) (administrative subpoenas are to be enforced unless information sought is irrelevant to "a lawful purpose of the agency"); *General Fin. Corp. v. FTC,* 700 F.2d 366, 369 (7th Cir. 1983) (noting "limited" scope of judicial review of CIDs). One obvious reason for the

different standards is that CIDs involve disclosure of information to the government for investigative purposes, while the FOIA involves disclosure to the public at large. *See Reporters Committee,* 489 U.S. at 770 ("The right to collect and use [personal] data for public purposes is typically accompanied by a concomitant . . . duty to avoid unwarranted disclosures.") (quoting *Whelan v. Roe,* 429 U.S. 589, 605 (1977)); *see also* section 21(b) of the FTC Act, 15 U.S.C. § 57b-2(b) (statutory provision governing confidentiality of information received by FTC pursuant to CIDs). Furthermore, complaints to the FTC about unfair or deceptive trade practices by the companies that hold the complainers' mortgages or supply their credit cards or telephone services are in no way parallel to decisions to complain directly to the companies themselves. The personal privacy interests of consumers did not disappear when they complained to the FTC.

Lakin also contends that the FTC is already releasing the withheld information to other entities, citing the database of the "Consumer Sentinel." *See* www.consumer.gov/sentinel/about/htm. This argument is unavailing. Consumer Sentinel is a consumer fraud database accessible to law enforcement officials and shared with law enforcement partners in the United States and abroad. Public and private organizations contribute complaints to the database in an effort to combat illegal activities. The fact that a limited group of law enforcement officials has access to these nonpublic files does not alter the individual consumers' privacy interests in keeping their identities and home addresses free from general public disclosure. Moreover, the FTC cannot waive individual consumers' privacy interests – whatever it does or fails to do. *See, e.g., Sherman v. U.S. Dep't of the Army,* 244 F.3d 357, 363-64

(5th Cir. 2001) ("[O]nly the individual whose informational privacy interests are protected by Exemption 6 can effect a waiver of those privacy interests.").

Lakin also contends that disclosure is not "unwarranted" because the website that consumers use to make complaints to the Commission cautions that the information provided may be subject to release under the FOIA. *See* www.ftc.gov/ftc/privacy/htm. But a warning that FOIA disclosure "may be required by law" cannot be construed as a waiver by the consumer of the privacy rights *protected* by the FOIA. *See, e.g., Hill v. Dep't of Agriculture,* 77 F. Supp. 2d 6 (D.D.C. 1999) (similar statement in Farmers Home Administration loan application is a warning, not a waiver).

Finally, Exemption 6 requires a balancing of individual privacy interests of consumer complainants against the public interest in disclosure to determine whether disclosure is "clearly unwarranted." The Supreme Court has repeatedly held that the only public interest that is relevant to this balancing test is the shining of a light on an agency's performance of its statutory duties. *Reporters Committee,* 489 U.S. at 773. Compelling disclosure of the identity of consumers' complaints about cramming would not further the core purpose of the FOIA. Lakin has failed to carry its burden of "identify[ing] with reasonable specificity the public interest that would be served by release" of the withheld identifying information. *See Hale v. U.S. Dep't of Justice,* 973 F.2d 894, 900 (10th Cir. 1992), *vacated and remanded on other grounds,* 509 U.S. 918 (1993), and *Senate of the Commonwealth of Puerto Rico v. U.S. Dep't of Justice,* 823 F.2d 574, 588 (D.C. Cir. 1987) (R.B. Ginsburg, J.) (requester must demonstrate that

there is a public interest in the specific information being withheld).

The judgment of the district court is AFFIRMED. A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

THE LAKIN LAW FIRM, P.C.,

Plaintiff,

v. **02-CV-01121-DRH**

FEDERAL TRADE COMMISSION,

Defendant.

MEMORANDUM AND ORDER

(Filed Mar. 4, 2003)

Herndon, District Judge:

I. Introduction

Before the Court is Defendant's motion to dismiss (Doc. 2). On November 1, 2002, the Lakin Law Firm ("Lakin") filed a complaint against the Federal Trade Commission ("FTC"), alleging that the FTC violated its right under the Freedom of Information Act ("FOIA"), **5 U.S.C. § 552** ***et seq.*** On May 22, 2002, Lakin requested documents from the FTC seeking disclosure of the names and addresses of consumers who had made complaints to the FTC about certain companies "cramming" unauthorized charges onto consumer bills. Pursuant to **5 U.S.C. § 552(b)(6)**, on July 2, 2002, the FTC partially denied this request by redacting the names and addresses from the requested documents. As a result, Lakin sought administrative review of this decision. On August 9, 2002, the FTC upheld the decision to redact, stating that under **5 U.S.C. § 552(b)(6)**, consumer names, addresses, and other identifying information are exempt from the FOIA disclosure

requirements. Subsequently, Lakin filed this suit, seeking review of the FTC's decision and requesting disclosure of the consumer names, addresses, and all other documents responsive to the May 22, 2002 request.

The FTC filed a motion to dismiss on December 5, 2002 (Doc. 2). The FTC asserts that dismissal is proper because disclosure of consumer names, addresses, and other identifying information is not required under the FOIA pursuant to **5 U.S.C. § 552(b)(6)** ("Exemption 6"). Lakin opposes the motion, arguing that determining whether the requested documents are exempted from disclosure under Exemption 6 is a question of fact, rather than a question of law, and, therefore, dismissal is improper (Doc. 5). For the following reasons, the Court grants the FTC's motion to dismiss (Doc.2).

II. Analysis

A. Motion to Dismiss Standard

When ruling on a motion to dismiss for failure to state a claim, the district court assumes as true all facts well-pled plus the reasonable inferences therefrom and construes them in the light most favorable to the plaintiff. ***Fries v. Helsper*, 146 F.3d 452, 457 (7th Cir. 1998) (citing *Wiemerslage Through Wiemerslage v. Maine Township High Sch. Dist. 207*, 29 F.3d 1149, 1151 (7th Cir. 1994)).** The question is whether, under those assumptions, the plaintiff would have a right to legal relief. ***Id.*** This standard also has been articulated:

> [U]nder "simplified notice pleading," . . . the allegations of the complaint should be liberally construed, and the "complaint should not be dismissed for failure to state a claim unless it

> appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

***Lewis v. Local Union No. 100 of Laborers' Int'l Union*, 750 F.2d 1368, 1373 (7th Cir. 1984) (quoting *Conley v. Gibson*, 355 U.S. 41, 46-47 (1957)). Accord *Fries*, 146 F.3d at 457; *Vickery v. Jones*, 100 F.3d 1334, 1341 (7th Cir. 1996).**

The Seventh Circuit has reiterated the liberal standard governing notice pleading:

> It is sufficient if the complaint adequately notifies the defendants of the nature of the cause of action. . . . As the Supreme Court has recently reminded us, the Federal Rules of Civil Procedure do not permit us to demand a greater level of specificity except in those instances in which the Rules specifically provide for more detailed elaboration. See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).

***Duda v. Bd. of Educ. of Franklin Park Pub. Sch. Dist. No. 84*, 133 F.3d 1054, 1057 (7th Cir. 1998); *See also Kaplan v. Shure Bros., Inc.*, 153 F.3d 413, 419 (7th Cir. 1998).** In fact, the Seventh Circuit has instructed that a plaintiff's claim *must* survive a 12(b)(6) dismissal motion if relief could be granted under *any* set of facts that could be proved consistent with the allegations. ***Hi-Lite Prods. Co. v. Am. Home Prods. Corp.*, 11 F.3d 1402, 1409 (7th Cir. 1993).**

B. Applicability of Exemption 6

The FTC argues that the consumer names and addresses contained in the FTC's records are protected from disclosure under Exemption 6 because disclosure of such information constitutes an invasion of personal privacy. The Court agrees. While "disclosure, not secrecy, is the dominant objective of the [FOIA]," certain kinds of information are protected from the statute's broad reach. ***Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).** Exemption 6 provides that the FOIA's disclosure requirements do not apply to "personal and medical files and *similar files*, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." **5 U.S.C. § 552(b)(6) (emphasis added).** The FTC does not contend that the requested information is contained in a "personal" or "medical" file. Therefore, the Court need not address these issues. The FTC argues only that the information sought is contained in a "similar" file.[1] If the information is contained in a "similar" file, the Court must determine whether disclosing the information would result in an unwarranted invasion of personal privacy. ***City of Chicago v. U.S. Dep't of Treasury*, 287 F.3d 628, 635 (7th Cir.), *amended by*, 297 F.3d 672 (7th Cir.), *cert granted*, 123 S. Ct. 536 (2002).**

The "similar files" provision referred to in Exemption 6 was intended to cover "[g]overnment records on an individual which can be identified as applying to that individual" or "information which applies to a particular individual." ***U.S. Dep't of State v. Wash. Post Co.*, 456**

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[1] Similar to personal and/or medical files.

U.S. 595, 598 (1982) (citations omitted). Furthermore, the Supreme Court has made plain that "similar files" is not limited to files that contain "intimate details and highly personal information." ***Id.*** **at 600 (citations omitted); *Cf. City of Chicago*, 287 F.3d at 635 (holding that Bureau of Alcohol, Tobacco, and Firearms' records that contained names and addresses of purchasers of weapons recovered in connection with crimes were not "similar files" under Exemption 6 because such files were "not of such a sensitive nature that their disclosure could harm or embarrass the individual.").**

In this case, the Court finds that the FTC records containing the requested information are "similar files" under Exemption 6. The FTC files contain the names, street addresses, zip codes, and other information identifying the individual consumers who filed complaints. Thus, the records contain "information which applies to a particular individual," and, as such, they qualify as "similar files" under Exemption 6. ***See Wash. Post*, 456 U.S. at 458.**

The Court recognizes that this finding may conflict with the Seventh Circuit's recent opinion in ***City of Chicago.*** Under ***City of Chicago*,** the FTC records probably do not qualify as "similar files" under exemption 6 because a person's name or address is not "sensitive" information that "might harm or embarrass" an individual. ***See City of Chicago*, 287 F.3d at 635.** However, the Supreme Court has previously rejected similar reasoning, finding that the "intimate nature" of the information contained in government records has no bearing on whether the records constitute "similar files"

under Exception 6. ***See Wash. Post Co.*, 456 U.S. at 600.**[2] This Court will adhere to the standard set forth in ***Washington Post*** until the Supreme Court instructs it to do otherwise.

This, however, does not end the Court's analysis. The FOIA may still require disclosure if disclosing the information would not result in an "unwarranted invasion of personal privacy." ***See* 5 U.S.C. § 552(b)(6)**. To determine whether disclosure constitutes this degree of an invasion of privacy, courts must weigh the public's interest in disclosure against the privacy interest in non-disclosure that Exemption 6 was intended to protect. ***U.S. Dep't of Defense v. Fed. Labor Relations Authority*, 510 U.S. 487, 494 (1994)**. Only the "core purpose" behind Congress's enactment of the [FOIA] may be considered in determining the relevant public interest. ***Id.*** The Court has stated that "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within the [FOIA's] statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct." ***Dep't of Justice v. Reporters Comm'n for Freedom of the Press*, 489 U.S. 749, 773 (1989) (quotations omitted)**.

The Supreme Court has recognized that a person has "some non-trivial privacy interest in non-disclosure" of

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[2] Additionally, the Court notes that the United States Supreme Court has granted *certiorari* in *City of Chicago*. As such, the Seventh Circuit's opinion is subject to modification.

personal matters, including home addresses and phone numbers, even where such information is available to the public through alternative sources, such as a telephone book. ***See Fed. Labor Relations Authority*, 510 U.S. at 500**; ***Accord Fed. Labor Relations Authority. v. U.S. Dep't of the Navy*, 975 F.2d 348, 352-53 (7th Cir. 1992)**. Nor do individuals who give information or express opinions to the government relinquish their privacy interest for purposes of Exemption 6. ***See, e.g., Strout v. U.S. Parole Comm'n*, 40 F.3d 136, 139 (6th Cir. 1994); *Voinche v. Fed. Bureau of Investigations*, 1997 WL 4111685 (D.C. Cir. 1997)**. However, where a statute requires that an individual's name be made public, the Court may not protect such a privacy interest. ***See, e.g., City of Chicago*, 287 F.3d at 636**. No such statute is present in this case.

Here, the Court finds that the privacy interest in non-disclosure outweighs the public's interest in disclosure. The FTC has already supplied Lakin with information revealing personal financial transactions. While such a disclosure by the FTC "constitutes a *de minimis* invasion of privacy" because "the identities of the [individuals] are unknown . . . the invasion of privacy becomes significant when the personal information is linked to a particular [person]." ***U.S. Dep't of State v. Ray*, 502 U.S. 164, 176 (1991)**. The redacted information Lakin requests, if supplied, would link the information already supplied to Lakin with specific individuals, which, according to the Supreme Court, constitutes not a *de minimis* invasion of privacy, but a significant one.

Additionally, the relevant public interest in disclosing the requested information is negligible, at best. Indeed there may be a public interest in "bringing companies the

consumers are complaining [about] to justice." (Doc. 1, Exhibit C). However, disclosure would *not* serve the core purpose of the FOIA, which was "fundamentally designed to inform the public about agency action and not to benefit private litigants." ***Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 144 n.10 (1975) (citations omitted)**. Both of the parties, and this Court, are aware that the information the FTC withheld contains the names and addresses of specific consumers who filed complaints regarding unauthorized charges by certain companies. This limited knowledge of the contents of the redacted information is sufficient for the Court to conclude that further disclosure is unnecessary to achieve the "core purpose" of the FOIA.

Furthermore, because the FTC has already disclosed to Lakin the non-identifying information contained in its records, the FTC has acted in accordance with the FOIA's purpose of informing the public about agency action.[3] This disclosed information already highlights the efforts made, and methods employed, by the FTC in policing fraudulent commercial transactions. Therefore, it is sufficient to achieve the goals of the FOIA.

The Court acknowledges that contacting individual consumers to investigate their satisfaction with the FTC's actions in handling complaints may shed additional light on the agency's efficiency. However, this public gain, if any, is minimal and does not outweigh the privacy interest

[3] The information already disclosed includes information regarding financial transactions that prompted complaints and the complainant's cities and states of residence.

in non-disclosure clearly present in this case. "Because a very slight privacy interest would suffice to outweigh [a] virtually non-existent public interest in disclosure, [a court] need not be exact in [its] quantification of the privacy interest. . . . [I]t is enough that the [private] interest in non-disclosure is not insubstantial." ***Fed. Labor Relations Authority*, 510 U.S. at 500**. Releasing specific consumer names and addresses will not provide significantly more information regarding the FTC's performance of its duties than the information that the FTC has already disclosed to Lakin. Such a minimal benefit to the public's interest in disclosure should not prevail at the expense of a person's well-established privacy right in non-disclosure of his or her name and address. ***See Strout*, 40 F.3d at 139**.

Finally, to allow such discovery in this case would disclose the very information Exemption 6 was designed to protect. It strains reason to assert that Congress intended to allow the protections afforded to information under the FOIA to be sidestepped by discovery requests made in the course of litigation. ***See Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp.2d 19, 25 (D.D.C. 2000)**. Therefore, pursuant to Exemption 6, disclosure of the consumer names, addresses, and other identifying information is not required because it would result in a "clearly unwarranted invasion of personal privacy." **5 U.S.C. § 552(b)(6)**.

Lakin argues that "doubtless after some minimal discovery," it will better be able to demonstrate a public interest in disclosure (Doc. 5, pg. 8). As a result, Lakin urges the Court to deny the FTC's motion to dismiss and allow the case to proceed to summary judgment. The Court will not do so. Based upon the pleadings, it is clear that

the FTC records are "similar files" under Exemption 6 and that the privacy interest in non-disclosure outweighs any public interest in disclosure. As a result, the FTC, as a matter of law, is not required to disclose the consumer information that Lakin requests. ***Washington Post Co.*, 456 U.S. at 598**.

III. Conclusion

For the foregoing reasons, the Court finds that the FTC is not required to disclose the information that Lakin requests. Accordingly, the Court **GRANTS** the FTC's motion to dismiss (Doc. 2). The Court **DISMISSES with prejudice** this cause of action.

IT IS SO ORDERED.

Signed this 4th day of March, 2003.

/s/ David R. Herndon
DAVID R. HERNDON
United States District Judge

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

February 11, 2004

Before

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

Hon. ANN C. WILLIAMS, *Circuit Judge*

No. 03-1689

THE LAKIN LAW FIRM, P.C., *Plaintiff-Appellant,* *v.* FEDERAL TRADE COMMISSION, *Defendant-Appellee.*	Appeal from the United States District Court for the Southern District of Illinois. No. 02-CV-1121-DRH David R. Herndon, *Judge*.

ORDER

On January 12, 2004, the appellant Lakin Law Firm filed a petition for rehearing and a petition for rehearing en banc. The panel has unanimously voted to deny the petition for rehearing, and no judge in active service has called for a vote on the petition for rehearing en banc. Accordingly, both petitions are DENIED.

APPENDIX D

5 U.S.C.A. § 552

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public –

> **(A)** descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
>
> **(B)** statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
>
> **(C)** rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
>
> **(D)** substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
>
> **(E)** each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal

Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying –

> **(A)** final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> **(B)** those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
>
> **(C)** administrative staff manuals and instructions to staff that affect a member of the public;
>
> **(D)** copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and
>
> **(E)** a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes

available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if –

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to –

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that –

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public

interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section –

> **(I)** if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or
>
> **(II)** for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the

matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[**(D)** Repealed. Pub.L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357]

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall –

> (i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making

such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether

exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests –

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative

remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the

fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records –

> **(I)** in cases in which the person requesting the records demonstrates a compelling need; and
>
> **(II)** in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure –

> **(I)** that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and
>
> **(II)** expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means –

> **(I)** that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
>
> **(II)** with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal-Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(b) This section does not apply to matters that are –

> **(1)** (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose

techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and –

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include –

> **(A)** the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests;

(F) the total amount of fees collected by the agency for processing requests; and

(G) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means.

(3) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(4) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(5) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term –

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department,

Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including –

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.